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No. 90-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JOSEPH PATRICK DOHERTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should review an interlocutory decision granting a motion to reopen when the uniqueness of the case will not permit a decision of general applicability and any decision by this Court will be mooted by new regulations the Attorney General is compelled to issue by May 28, 1991.

2. Whether the Court should review an interlocutory circuit court decision reversing the denial of a motion to reopen when the Attorney General has admitted that factors he relied on in denying the motion were not relevant considerations.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF FACTS

The respondent, Joseph Patrick Doherty, respectfully requests that this Court deny the petition for a writ of certiorari.

For now more than seven years, the executive branch campaign to deliver the respondent to the United Kingdom has been unsuccessful. Decisions adverse to the

executive branch have punctuated the years of litigation. With each successive defeat, it has resorted to positions more aberrant.

The case's convoluted course, its unique history, and its peculiarly fact-specific nature are alone compelling reasons for denying the petition. We therefore present a detailed statement of the facts.

* * *

On June 18, 1983, Joseph Patrick Doherty was seized by FBI and INS agents pursuant to an INS order to show cause and warrant of arrest. C.A. App. 1-2.[1] Within ten days, he filed a request for political asylum. C.A. App. 4-13. He stated that he feared persecution in the United Kingdom and that his life would be in

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[1]"C.A. App." references are to the joint appendix in the Second Circuit. "App." references are to the appendix to the certiorari petition.

danger were he deported there. Ibid.

On June 28, 1983, the British government requested the respondent's extradition. The immigration judge immediately adjourned the deportation proceeding. It remained in abeyance until the extradition-related proceedings were finally decided. C.A. App. 45-46. The extradition litigation spanned three years and produced the decision in respondent's favor that the executive branch seeks yet to circumvent.

The Extradition Phase of the Litigation: Successive Losses for the Government.

The formal extradition request, filed on August 16, 1983, stated that the respondent had been convicted in Northern Ireland of murder, attempted murder, and possession of firearms and ammunition. It further alleged that he was wanted for offenses arising from the escape he and seven other IRA volunteers made from a

British prison in Belfast. Matter of Doherty by Government of the United Kingdom, 599 F.Supp. 270, 272 (S.D.N.Y. 1984).

U.S. District Court Judge John E. Sprizzo conducted the extradition proceeding. The evidentiary hearings consumed eight days. Witnesses testified for the government and for the respondent.

On December 12, 1984, the district court denied the extradition request, finding that the political character of the respondent's offenses barred his extradition. The decision defined very restrictively the nature of those offenses capable of qualifying as political.

Analyzing the respondent's conduct in the context of the voluminous evidence put forward, the judge concluded that the respondent's offenses were unquestionably political. He held that "the facts of this case present the assertion of the political offense exception in its most

classic form." Id. at 276.

On February 4, 1985, the executive branch filed a declaratory judgment action seeking a judgment declaring Joseph Doherty extraditable. Such action was unprecedented. United States v. Doherty, 786 F.2d 491, 500 (2d Cir. 1986). The district court dismissed for failure to state a claim. United States v. Doherty, 615 F.Supp. 755 (S.D.N.Y. 1985). The government's litigation posture prompted the district court to inquire "whether unlimited repetitions of judicially rejected contentions comport with the dignity of the United States Attorney's office." Id. at 760 n. 5.

The Second Circuit, in a unanimous decision, affirmed, observing that "Judge Sprizzo engaged in a careful analysis of the political offense exception." United States v. Doherty, 786 F.2d at 493-494. As to why the government pressed a posi-

tion the court termed "startling," as opposed simply to refiling the extradition request, the court stated that "it fears it may lose when it tries again[.]" Id. at 495, 500. The government's petition for rehearing was denied.

The Deportation Phase of the Litigation: Losses for the Government Before the Immigration Judge and the BIA.

When the executive branch did not petition for certiorari, the immigration proceeding resumed on September 5, 1986. Counsel for the respondent advised the immigration judge that the respondent conceded his deportability and would designate Ireland as his country of deportation, the right of designation being afforded by 8 U.S.C. 1253(a).

The respondent's Irish citizenship was not disputed (App. 4a, 46a, 116a, 141a, 149a), and the Irish government was willing to accept him. App. 98a-99a. The latter fact was known to the respondent,

the immigration judge, and the government and had been confirmed by a letter from the Irish vice-consul. C.A. App. 105, 127, 247-248, 258-259.

The respondent's designation of Ireland was entirely proper under the statute. Further, having already been in custody for more than three years, he had no incentive to delay. Through the designation, he sought only to avoid deportation to the United Kingdom, where he feared persecution.

Based on justifiable expectation that he would be deported to Ireland pursuant to his designation, the respondent withdrew his earlier-filed application for political asylum from the United Kingdom. App. 14a, 99a; and see C.A. App. 105, 113, 115. No deportee's designation had ever been disallowed on the ground of prejudice to the interests of the United States. The INS asserted that the respondent's

must be. It had never before raised such claim. App. 155a.

Having raised it, the Service failed to support it. App. 158a. The immigration judge allowed the Service several adjournments to do so. When the Service produced nothing further, the immigration judge ordered the respondent deported to Ireland. App. 158a-159a. It being already established that Ireland would accept him, the immigration judge did not inquire whether the respondent feared persecution in the United Kingdom.

The Service's claim that deportation to Ireland would be prejudicial to the interests of the United States failed consistently. The immigration judge rejected it once, the BIA twice. App. 134a-147a, 156a-159a. The BIA noted that the INS's position was unprecedented. App. 155a.

The JNS had the BIA decision certified to Attorney General Edwin Meese.

App. 5a-6a. The case rested in his office for an entire year. On June 9, 1988, he disallowed the respondent's designation of country and ordered him deported to the United Kingdom. App. 116a-130a.

<u>The Respondent's Motion to Reopen: The BIA Grants His Motion and Awards Him a Hearing on His Claims for Political Asylum and Withholding of Deportation.</u>

Six months prior to the issuance of the Meese decision, the respondent filed a motion to reopen. It sought remand of the case "for the purpose of a hearing on respondent's claims for asylum ... , withholding of deportation ... , and for redesignation of country of deportation." C.A. App. 364.

The motion was expressly grounded upon the implementation, in Ireland, of the Extradition (European Convention on the Suppression of Terrorism) Act, 1987. App. 6a; C.A. App. 366, 372-373. The Act became effective on December 1, 1987. The

respondent filed his motion on December 3, 1987. C.A. App. 364-456.

Section 3 of the Act had no forebear in Irish law. It specified that certain offenses could not be regarded as political offenses; it rendered the political offense exception inapplicable as a matter of law to offenses for which the British government sought the respondent's extradition. As to those offenses, extradition became mandatory with the Act's implementation. C.A. App. 461.

When the Act became effective on December 1, 1987, the order directing the respondent's deportation to Ireland became the functional equivalent of an order directing his extradition from Ireland to the United Kingdom. Confronted with the emergent certainty of return to the country from which he had consistently sought refuge owing to fears of persecution, the respondent moved immediately to reassert

the applications for political asylum and withholding of deportation lodged in June 1983 and withdrawn in September 1986 in conjunction with his designation of Ireland.

The Board, 3-2, granted the respondent's motion to reopen on November 14, 1988. App. 92a-115a. The decision discussed what the regulations which govern motions to reopen require. The Board applied its expertise in the interpretation of those regulations to the respondent's motion and determined it was appropriately granted.

The Board emphasized that subsequent to the respondent's designation of country, circumstances changed, indeed in a way "unprecedented." App. 99a. The singular facts of the case were again emphasized. The Board recognized that the regulations governing motions to reopen had been promulgated to permit precisely

this type of situation to be addressed: they protect the potential deportee when changed circumstances raise the threat of persecution; they protect the Attorney General's delegatees from having to expend scarce time passing upon asylum claims based on remote or "unripe" fears of persecution. App. 98a-99a.

The Board determined that the respondent's evidence established a prima facie claim of a well-founded fear of persecution. App. 99a; and see C.A. App. 4-13, 407-455, 503-709. His asylum application stated, inter alia, that "[o]nce incarcerated my life would be in danger." It further stated that he had already been the victim of persecution in the United Kingdom, having been tortured and beaten while in the custody of the security forces there. C.A. App. 8, 11.

His motion to reopen detailed that threats have already been made by the

security forces to family members about that which awaits the respondent upon his return. Evidence supporting the motion documented that the security forces have the will and ability to carry the threats out.[2] C.A. App. 503-709.

The respondent's supporting submissions established, inter alia, that family members have been subject to repeated

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[2] The number and frequency of fatal shootings by the security forces of young men believed to be members of or sympathizers of the republican movement caused Amnesty International to conclude that "a wide-ranging judicial inquiry is essential." The respondent had submitted the Amnesty report to the Board. C.A. App. 514-516, 517-518, 543-544. The respondent had also submitted a book by the senior British police official deputed to conduct an official government inquiry into six such "shoot-to-kill" incidents. He stated in his book:

> The circumstances of those shootings pointed to a police inclination, if not a policy, to shoot suspects dead without warning rather than to arrest them. Coming, as these incidents did, so close together, the suspicion of deliberate assassination was not unreasonable. C.A. App. 690.

arrest and interrogation, that a sister's home has been often raided by the security forces, and on one such occasion, the security forces seized the transcript of the respondent's testimony before Judge Sprizzo, that relatives, friends, and neighbors have been victims and targets of sectarian attacks running the gamut from beatings, to attempted murder, to actual murder, that the respondent's family and the other occupants of their tiny nationalist enclave live subject to the intrusive daily presence in their homes and on their streets of the British Army and the paramilitary Royal Ulster Constabulary (RUC), that, in addition to the respondent, a sister was interned by the British government and, as with respondent, imprisoned without charges and without trial, that respondent's family's home was destroyed when bombed by loyalist paramilitaries, and that the respondent's case has been

the subject of provocative media attention in the United Kingdom. C.A. App. 8-11, 13, 407-448.

Finally, certain particulars of the case--with which the Board was familiar, the case having already been before it on four occasions--were made the subject of specific comment. The Board stated:

> The respondent has not been accused of any violations of law in the United States other than his illegal entry. At least one United States court has found that his crimes in the United Kingdom were politically motivated.

The Board concluded that the motion should be granted in an exercise of its discretion. App. 99a-100a.

Attorney General Thornburgh Reverses the BIA Decision in Favor of the Respondent.

The Service had the BIA decision in favor of the respondent certified to the Attorney General. App. 7a. No other case has ever been twice subjected to certification review by the Attorney General.

On June 30, 1989, the Attorney General reversed the BIA decision that had granted the respondent a hearing. App. 46a-91a. The Attorney General turned first to discrediting the argument that Attorney General Meese's order directing deportation to the United Kingdom was "an unforeseen, adverse administrative decision, constituting a 'new fact.'" App. 57a, 62a, 65a-67a.

The respondent had never made any such argument. He had no need of it; his motion to reopen was filed six months before the Meese decision issued. The motion was premised on the change in his circumstances occasioned by the implementation of the Extradition Act--not by the issuance of the Meese order[3]--and it was

[3]The Meese and Thornburgh decisions themselves acknowledge that the filing of the motion to reopen was premised on the December 1, 1987, implementation of the Extradition Act. App. 53a, 57a and n. 19, 129a. The motion had actually been before

filed within 48 hours of the implementation of the Act.

The Attorney General found that the Extradition Act was not "previously unobtainable material evidence" or "reasonable justification permitting respondent to withdraw his waiver of his claim for asylum." He further determined that implementation of the Act was "neither sudden nor unforeseeable" and that it had no material effect on the respondent's position. App. 59a-71a, 74a. The Attorney General eschewed reference to the Extradition Act's Section 3, which refutes his determination that the Act had no material effect on the respondent's position.

Although the BIA had found the respondent's fears of persecution sufficiently compelling to warrant an evidentiary

Attorney General Meese for a considerable period of time prior to the issuance of his decision; he chose to remand the motion to the BIA. App. 129a.

hearing, the Attorney General denied the respondent the ultimate relief sought without affording him the hearing the BIA had ordered. He ruled that the respondent was not entitled to political asylum and was statutorily ineligible for withholding. App. 82a-91a.

The Attorney General did not balance the nature and degree of persecution awaiting the respondent in the United Kingdom against any of the considerations recited to justify the Attorney General's negative exercise of discretion: the Attorney General specifically refused to consider the evidence put forward in support of the respondent's claims of persecution. App. 64a n. 21. Finally, with complete disregard for the district court's decision that the respondent had committed only political crimes, the Attorney General concluded precisely to the contrary, finding that he had committed

serious nonpolitical crimes--and engaged in the persecution of others--and was therefore ineligible for the relief sought. App. 83a-88a.

The Decision at Issue: The Second Circuit Rules That the Attorney General Abused His Discretion in Denying Respondent a Hearing.

Attorney General Thornburgh expressly acknowledged, citing decisions of this Court, that his decision was subject to judicial review for abuse of discretion. App. 55a and n. 8. The Second Circuit reviewed it and, 2-1, "conclude[d] that in the singular circumstances of this case he abused his discretion in denying Doherty's motion to reopen." App. 12a. The court remanded the case to the Board for further proceedings.[4] App. 28a-29a.

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[4]Although the court reversed the Thornburgh decision, it affirmed the Meese decision. It held that under 8 U.S.C. 1253(a), Congress had "left the Attorney General broad discretion to determine what constitutes prejudice to national interests," and that such finding is "'essentially unreviewable[.]'" App. 8a.

Writing for the majority, Judge Pratt stressed that the Attorney General's determinations as to the ultimate availability of the relief sought could not properly be made on the existing record. As to the withholding of deportation claim, Judge Pratt stated that "the need for an evidentiary hearing should be obvious[]" as the respondent's ultimate success or failure necessarily turns on the resolution of "formidable questions of fact that cannot be adequately resolved in the absence of an evidentiary record." App. 16a-17a. As to the asylum claim, he noted, similarly, that its correct resolution turned on "facts...more properly determined at a hearing[.]" App. 26a-27a.

The Attorney General had expressly stated that he could decline to reopen even when the movant had established a prima facie case for withholding of deportation. App. 64a n. 21. The court point-

ed out that INS v. Abudu, 485 U.S. 94 (1988), is to the contrary. App. 16a.

The court found that the Attorney General "seriously exceeded his discretion" when he denied the respondent political asylum on the ground that deporting him to the United Kingdom, his fears of persecution notwithstanding, would advance United States foreign policy interests. App. 26a. The court further found that this decision was premised "on the types of geopolitical concerns that congress intended to eliminate from asylum cases" (App. 25a), and thus was not based on "the 'legitimate concerns' of the relevant statutory provision," the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. App. 18a.

The court rejected the "foreseeability" standard on which the Attorney General had relied, finding that it had no foundation in law and "would lead to absurd con-

sequences" if applied. App. 13a-15a. It noted that even under this spurious criterion, the Attorney General's decision was insupportable: the Meese order disallowing deportation to the designated country was hardly "foreseeable," since the Attorney General had never before invoked his discretion to disallow a proper designation. App. 14a.

The court also rejected the Attorney General's determination that the respondent had "waived" his right to seek relief through asylum and withholding in 1987, having "assumed the risk" of all subsequent changes in circumstances when he did not go forward on his claims for asylum and withholding in 1986. App. 79a-80a. The court found such reasoning "incompatible with any motion to reopen." App. 27a. It concluded by stating that "the government's professed concern for the 'integrity of the administrative process' [is] unconvincing in light of its own actions in this case."[5] App. 28a.

REASONS FOR DENYING THE WRIT

Summary of the Argument

Recent developments bear directly on the questions presented in the certiorari petition. These developments militate strongly against the grant of certiorari. Certiorari is also unwarranted given the

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[5]Judge Lumbard concurred in the affirmance of the Meese order and dissented from the reversal of the Thornburgh order. App. 29a-45a. He faulted the majority for "implicitly" concluding that the Board's decision deserved more deference than Attorney General Thornburgh's, having earlier noted that despite seven years "to develop and present his case," the respondent "failed to convince the Attorney General" of its merit. App. 34a, 33a.

Over the course of those seven years, the respondent had, however, on no less than eight separate occasions, convinced district court judges, Second Circuit judges, immigration judges, and BIA members that his legal positions have merit. Given this history, the Second Circuit, as the reviewing court, was entitled to note that the Attorney General's decisions had been at odds with those of his delegatees. Cf. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

interlocutory stage of the proceedings and the highly particularized nature of the case.

The executive's petition attacks allegedly incorrect interpretations of the regulations governing motions to reopen. The Immigration Act of 1990, enacted on November 29, 1990, compels the Attorney General to issue new regulations governing reopening by May 28, 1991. See Appendix 1. The imminence of these new regulations obviates any need for the Court to speak on reopening at the present time and makes it likely that such opinion would be of limited utility. Any further attention by the Court to motions to reopen would be more usefully directed to guiding the evolving administrative practice under the new reopening regulations, rather than under the old ones.

The executive branch also contends that the Second Circuit grossly misinter-

preted the Refugee Act of 1980 by holding that foreign policy considerations are not relevant to the determination of an individual's application for political asylum. After filing the petition, the executive branch signed a settlement agreement in a major lawsuit challenging the manner in which asylum claims are adjudicated.

The stipulation thoroughly undercuts the argument that the Second Circuit's decision is wrong. The stipulation explicitly states that foreign policy considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution. See Appendix 2. The Second Circuit's decision is utterly consonant with the interpretation of the Refugee Act embodied in the stipulation to which the executive branch has bound itself.

Review by certiorari is ill-advised for reasons having to do with the nature

of the case itself. The history of the case is singular, the case itself is peculiarly fact-specific, and the decision at issue is interlocutory in nature.

The Board granted the respondent's motion to reopen, and the Attorney General reversed the Board. The administrative process culminated in nothing more than routine judicial review by the Second Circuit for abuse of discretion. Grant of certiorari at this juncture would be premature and unlikely to result in an opinion of broad applicability.

Recent events, as well as the history of the case, make clear that the executive branch does not come before this Court with serious questions about the Refugee Act and motions to reopen. Rather, as has been the consistent history of this case, the executive seeks to deprive the respondent of the benefit of yet another decision in his favor. That decision simply

says that the respondent is entitled to a hearing at which his claims for political asylum and withholding of deportation can be fairly addressed and resolved.

Given the government's goal of using the immigration proceeding to accomplish the respondent's de facto extradition to the United Kingdom, this Court should not countenance him being deprived of the protection of the ordered hearing, especially since his evidence of persecution has been found compelling enough to warrant one. The respondent's return, without hearing, to the country where he fears persecution cannot do other than send the clear message that for litigants disfavored by the government, there will not be equal justice under law.

1. The enactment of legislation compelling the Attorney General to issue new regulations governing motions to reopen by May 28, 1991, and this Court's prior attention to motions to reopen make review of the Second Circuit's interlocutory decision unnecessary.

The tone of the petition suggests that the Second Circuit has jeopardized the Republic by reversing the Attorney General's denial of the respondent's motion to reopen. The circuit court's decision is a modest one, however, and falls squarely within the ambit of pronouncements by this Court and by other circuits on such motions. Although rendered in a case that is singular, the decision itself is unremarkable and merely remands for a hearing on whether the respondent is entitled to the substantive relief sought.

This Court's voice has been heard regularly on motions to reopen. It has spoken on them even very recently. See INS v. Abudu, 485 U.S. 94 (1988); INS v. Rios-Pineda, 471 U.S. 444 (1985); INS v.

Jong Ha Wang, 450 U.S. 139 (1981) (per curiam).

In INS v. Abudu, 485 U.S. 94, this Court held that a court of appeals must apply the abuse-of-discretion standard when reviewing administrative denials of motions to reopen deportation proceedings to request asylum. Id. at 105, 107. Confronted with an administrative denial of a motion to reopen deportation proceedings to request asylum, the Second Circuit did only what this Court has ruled it should do: it reviewed for abuse of discretion, taking careful note of Abudu. App. 11a, 12a, 13a, 16a, 18a.

The Second Circuit decision does not conflict--in principle or otherwise--with Abudu or with any decision of any other circuit. No conflict can be fabricated out of dictum about the sensitive nature of asylum determinations. Pet. 20-21.

Courts of appeal are authorized to do

precisely what the Second Circuit did. They can, and regularly do, review decisions denying asylum and withholding of deportation. They can, and regularly do, reverse administrative denials both of motions to reopen and of administrative decisions denying applications for asylum and withholding. See, e.g., Perez-Alvarez v. INS, 857 F.2d 23 (1st Cir. 1988); Rodriguez v. INS, 841 F.2d 865 (9th Cir. 1987); Aviles-Torres v. INS, 790 F.2d 1433 (9th Cir. 1986); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985). In reversing the administrative denial of respondent's motion to reopen, the Second Circuit did nothing irregular or unusual.

Even had it, review by certiorari would remain unwarranted, owing to the effect of newly-enacted legislation. The Attorney General's argument is, at core, that the regulations governing motions to reopen did not permit respondent to file

his motion to reopen when he did, a view shared neither by the Second Circuit nor by the Board. Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 136 Cong. Rec. H13,229 (daily ed. Oct. 26, 1990), signed into law on November 29, 1990, compels the Attorney General to issue new regulations prescribing when motions to reopen can be filed, the maximum time period for filing them, and the number of such motions that can be filed. See Appendix 1 to this brief for the text of Section 545(d). The Attorney General must issue the new regulations by May 28, 1991. The imminent promulgation of the new regulations makes review of the instant decision an unworthy use of this Court's scarce judicial time.

2. The intensely fact-specific nature of the case, its convoluted and singular history, and the interlocutory stage of the proceedings make review by certiorari at this juncture unwarranted.

The decision at issue is interlocu-

tory and merely remands the case for a hearing. The court made no ruling on whether the respondent is entitled to the ultimate relief of either political asylum or withholding of deportation. It determined a hearing was necessary to resolve "formidable questions of fact" central to resolution of his entitlement to the relief sought. App. 16a-17a.

The Attorney General, in a profound abuse of discretion, had resolved those questions against the respondent. He did so on the basis of the record in a proceeding to which the respondent was not a party and without affording the respondent any hearing whatsoever.

The Attorney General punctuated his decision with abundant references to two of several McMullen decisions, one by the BIA, one by the Ninth Circuit. App. 84a-89a. As between the McMullen deportation proceeding and the instant case, there is

non-identity of parties and non-identity of issues. Yet the Attorney General relied on the record in that unrelated proceeding to establish that the respondent in the instant case had engaged in persecution of others and had committed serious non-political crimes.

Judge Sprizzo's decision unarguably speaks with more authority on the nature of the respondent Doherty's conduct than do decisions about the nature of the respondent McMullen's conduct. Judge Sprizzo's treatment of the character of the IRA and of the respondent Doherty's activities flatly contradicted the Attorney General's summarily-fashioned conclusion that the respondent was ineligible for the relief sought because he had persecuted others and engaged in serious non-political

crimes.[6]

Judge Sprizzo had had substantial evidence put before him. Witnesses had testified for the government and for the respondent. The respondent's personal history and his involvement in the Irish republican movement, including the Irish Republican Army (IRA), had been thoroughly examined, as had been the IRA as an organization and its activities. The respondent testified at length. Matter of Doherty, 599 F.Supp. at 270; and see C.A. App. 712-943.

The district court measured the respondent's conduct against the traditional criteria. Matter of Doherty, 599 F.Supp.

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[6]For precisely this reason, the Attorney General and the dissenting Judge Lumbard labored to explain why Judge Sprizzo's decision about the nature of the respondent's--Joseph Doherty's--activities was of no significance, while a decision about the nature of someone else's--Peter McMullen's--activities was dispositive. App. 84a, 44a.

at 274. Finding the traditional two-pronged analysis not adequately rigorous, Judge Sprizzo also evaluated the respondent's offenses as against a dozen other, stricter criteria.

The district court considered: (1) whether the nature of the act was violative of any international law or (2) inconsistent with international standards of civilized conduct; (3) the context in which the act was committed; (4) the status of the party who committed the act; (5) the nature of the organization on whose behalf the act was committed, including its structure and its mode of internal discipline; (6) the particularized circumstances of the place where the act took place; (7) whether the act was such as to cause indiscriminate death or injury or damage or (8) was directed against civilians or civilian representatives of the government or (9) was com-

mitted in a place other than the territory where political change was to be effected; (10) whether hostages were killed or injured; (11) whether principles in the Geneva Convention were violated; and (12) whether any act was committed for personal reasons. Id. at 274-277.

Having weighed all of these factors in the context of the voluminous evidence put forward about the respondent's conduct, Judge Sprizzo determined that the respondent had not committed common crimes. Rather he had committed only political offenses.

Even apart from Judge Sprizzo's decision, the Second Circuit was completely correct when it determined that the Attorney General seriously exceeded his discretion when he denied relief without permitting respondent the hearing ordered on his application for withholding of deportation. INS v. Abudu, 485 U.S. 94, speaks

directly to this point:

> [I]n cases in which the ultimate relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead ... and simply determine that ... the movant would not be entitled to the discretionary grant of relief. (emphasis added).

Id. at 105.

Further, the respondent had demonstrated prima facie entitlement to the relief sought. Nonetheless, the Attorney General denied him opportunity to present at hearing additional evidence in support of his applications for political asylum and withholding of deportation. The Attorney General did not even permit the respondent an evidentiary hearing at which he might establish the inapplicability of the grounds on which the Attorney General found him ineligible, i.e., that he had persecuted others and committed serious non-political crimes. The Second Circuit decision awarding the respondent a hearing

on his applications for asylum and withholding was consistent with the letter and spirit of existing authorities; the Attorney General's decision denying him any hearing whatsoever was not. See, e.g., Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979) at 20 para. 86, 36 para. 152, 37 paras. 156-157, 41 para. 176, 42 para. 180, 48 paras. 201-202; Castro-O'Ryan v. INS, 847 F.2d 1309, 1314 (9th Cir. 1988); Arauz v. Rivkind, 845 F. 2d 271, 276-277 (11th Cir. 1988); Shahandeh-Pey v. INS, 831 F.2d 1384, 1387-1389 (7th Cir. 1987); Matter of Gonzalez, Int. Dec. #3071 at 4, 5, 7 (BIA 1988); Matter of Pula, Int. Dec. #3033 at 9 (BIA 1987); 55 Fed. Reg. 30,683, 30,684 (to be codified, respectively, at 8 C.F.R. 208.13(c) and 208.14 and at 8 C.F.R. 208.16(c)).

Notwithstanding the thorough correct-

ness of the Second Circuit decision, other reasons make the instant case a vehicle ill-suited for certiorari review. Its essential inaptness for this purpose flows from the singular and convoluted nature of the litigation. Decisionmakers have frequently commented on its unique aspects. Even Judge Lumbard, whose dissent is the basis of the government's certiorari petition, acknowledged the "extraordinary" character of the case and its "unusual posture." App. 34a, 35a. A decision by this Court on any of the questions presented will thus be of little precedential value. The particularized facts of the instant case make the fashioning of an opinion capable of being of guidance to other litigants unlikely.

Finally, given the history of this case, the Court can be sure that when respondent's entitlement to the substantive relief sought is finally resolved,

this Court again will be confronted with a petition for certiorari. The Court can then address any issue(s) worthy of its attention on the basis of a fully-developed evidentiary record.

3. The petition should be rejected because the executive branch has acknowledged that foreign policy concerns and other political and ideological factors are not relevant to the determination of whether an applicant is eligible for asylum.

The government claims that the Second Circuit's decision is based on a profound misinterpretation of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The gravamen of its argument--that the Attorney General can grant or deny asylum, even to individuals found to have a well-founded fear of persecution, on the basis of foreign policy considerations--is squarely at odds with all analyses of the Act. Through it, the executive branch strives to have this Court read into the Refugee Act of 1980 the political and

geographic considerations Congress enacted that legislation to eliminate.

The Second Circuit engaged in a careful examination of the Act's legislative history, put before the court in an amicus brief filed by members of Congress. See Doherty v. U.S. Department of Justice, 908 F.2d 1108, 1110 (2d Cir. 1990). The Second Circuit concluded that in passing the Refugee Act of 1980,

> congress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum. To use Judge Learned Hand's terminology, these were "considerations that Congress could not have intended to make relevant" to asylum. [United States ex rel. Kaloudis v.] Shaughnessey, 180 F.2d at 491.

App. 21a; see also App. 17a-27a.

The executive branch petition argues that under the Refugee Act of 1980, the Attorney General is free to consider foreign policy concerns when passing on asylum applications. The Attorney General's

decision in the instant case gives ominous voice to that which is implicit in the executive's argument: the Attorney General may, when he finds it expedient, actually deny protection, on the basis of foreign policy considerations, to individuals in real danger of persecution.

In rejecting this perverse interpretation of an avowedly humanitarian law,[7] the Second Circuit, according to the executive branch, imposed "unprecedented" limitations (Pet. 14, 19) on the asylum process. In short, it erred, "gravely" and "fundamentally," when it found that the Attorney General abused his discretion in denying respondent's political asylum application because doing so advanced this country's foreign policy interests. App. 82a. To the contrary, the court's decision was utterly correct, and the govern-

[7] 126 Cong. Rec. 4501 (daily ed. Mar. 4, 1980) remarks of Rep. Rodino).

ment's own, very recent conduct underscores this fact.

After filing this petition, the executive branch signed a stipulated settlement agreement in a major lawsuit, American Baptist Churches v. Thornburgh, Civ. No. C-85-3255 RFP (N.D. Cal.). The American Baptist Churches suit, a class action, raised "systemic challenges to the processing of asylum claims."

The stipulated settlement agreement states that "under the new asylum regulations as well as the old" "foreign policy ... considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." (emphasis added.) The executive branch also stipulated that other irrelevant factors were whether the individual is from a country whose government the United States supports or with which it has favorable relations and whether the

United States agrees with the political or ideological beliefs of the asylum seeker. It also stipulated that the standard for determining whether an applicant has a well-founded fear of persecution applies uniformly to all applicants, regardless of nationality. See American Baptist Churches v. Thornburgh, Civ. No. C-85-3255 RFP, Stipulated Settlement Agreement (N.D. Cal.), dated Dec. 14, 1990, Appendix 2 hereto.

The stipulation, entered into by the Attorney General shortly after the certiorari petition was filed, illuminates the weakness of the "foreign policy concerns" argument advanced by the executive branch in its initial question presented. The language of the stipulation which the executive branch only very recently signed is an admission that the Second Circuit interpreted the Refugee Act correctly when it held that foreign policy and other geo-

political considerations are not relevant to the determination of asylum applications.

The circuit court's decision is embodiment of the very interpretation of the asylum regulations the executive branch bound itself to respect by virtue of the American Baptist Churches stipulation. It matters not that the stipulation speaks in terms of determining whether an individual has a well-founded fear of persecution, as opposed to whether he or she is entitled to asylum: it would be bizarre for the executive to argue that it can deny a refugee the ultimate relief of asylum on the basis of foreign policy considerations it cannot permissibly consider when making the threshold determination of whether the individual is a refugee and therefore in need of protection.

When evaluated in the context of the American Baptist Churches stipulation, the

petition is more clearly understood as the Attorney General's most recent effort to deprive the respondent of the benefit of yet another decision in his favor. It is, given the modest nature of the decision under attack, a particularly cynical effort.

On the basis of a record found to be incomplete and premature judgments as to the merits of the respondent's applications for relief (App. 16a-17a, 26a-27a), the Attorney General would have the respondent deported to a country where he is likely to be persecuted. The Second Circuit has said he is entitled to a hearing at which his claims for political asylum and withholding of deportation can be fairly resolved on the basis of examination of a fully developed record and exclusive of improper foreign policy and geopolitical considerations. Ibid. Given the government's zealous effort to use

this country's immigration laws to accomplish de facto the extradition denied the British government under this country's extradition laws, this case should come before this Court, if at all, only after hearing and only on the basis of the fully developed evidentiary record recognized by the Second Circuit to be essential to fair resolution of respondent's claims.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX 1

STATUTORY PROVISIONS INVOLVED

Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), 136 Cong. Rec. H13, 229 (daily ed. Oct. 26, 1990):

Sec. 545. DEPORTATION PROCEDURES: REQUIRED NOTICE OF DEPORTATION HEARING; LIMITATION ON DISCRETIONARY RELIEF.

* * *

(d) REGULATIONS ON MOTIONS TO REOPEN AND TO RECONSIDER AND ON ADMINISTRATIVE APPEALS. - Within 6 months after the date of the enactment of this Act, the Attorney General shall issue regulations with respect to -

(1) the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations include a limitation on the number of such motions that may be filed and a maximum time period for the filing

of such motions; and

(2) the time period for the filing of administrative appeals in deportation proceedings and for the filing of appellate and reply briefs, which regulations include a limitation on the number of administrative appeals that may be made, a maximum time period for the filing of such motions and briefs, the items to be included in the notice of appeal, and the consolidation of motions to reopen or to reconsider with the appeal of the order of deportation.

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN BAPTIST CHURCHES, et al., Plaintiffs, v. RICHARD L. THORNBURGH, GENE MCNARY, and JAMES A. BAKER, III, Defendants.	) Civ. No. C-85-3255 RFP) STIPULATED SETTLEMENT AGREEMENT

WHEREAS, Plaintiffs, many Salvadoran and Guatemalan citizens in the United States, have filed this action against Defendants, Richard L. Thornburgh, on behalf of the United States Department of Justice, Gene McNary, on behalf of the Immigration and Naturalization Service ("INS"), and James A. Baker, III, on behalf of the United States Department of State, raising, among other issues, systemic challenges to the processing of asylum claims filed by Salvadorans and

Guatemalans pursuant to the Refugee Act of 1980 and the regulations promulgated thereunder; and

WHEREAS, the system of asylum processing has been significantly changed by regulations effective October 1, 1990; and

WHEREAS, under the new asylum regulations as well as the old:

foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;

the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;

whether or not the United States Government agrees with the political or

ideological beliefs of the individual is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;

the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities; and

WHEREAS, Section 302 of the Immigration Act of 1990, Pub. L. No. 101-649, to be codified at Section 244A of the Immigration and Nationality Act, amends the Immigration and Nationality Act to authorize the Attorney General to designate any foreign state (or any part thereof) so as to give Temporary Protected Status to nationals of such state; and

WHEREAS, Section 303 of the Immigration Act of 1990 designates El Salvador under INA Section 244A and thereby enti-

tles Salvadorans who meet the requirements of Section 303 to Temporary Protected Status; and

WHEREAS, Plaintiffs and Defendants believe that it is in their best interests to settle this action by establishing the practices and procedures set forth below;

THEREFORE, Plaintiffs and Defendants enter into and stipulate that this agreement imposes binding obligations on the parties and their successors and that this agreement constitutes and full and complete resolution of the issues raised in this action.

* * *

[Body of stipulation omitted]

Dated: December 14, 1990

Signed:
For Plaintiffs:

/s/
Marc Van Der Hout
National Lawyers Guild

/s/
Lucas Guttentag
American Civil Liberties Union

/s/
James J. Garrett
Michael L. Zigler
Lori A. Schechter
Darryl L. Hamm
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/s/
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Center for Constitutional Rights

Attorneys for Plaintiffs

For Defendants:

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Immigration and Naturalization Service

/s/
Executive Office for Immigration Review

/s/
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/s/
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